

Appeal No. 143 of 2008 by which, the learned Judge instead of remanding the matter for limited purpose, set aside the entire judgment and decree passed by the trial Court.

3. Present Appellant Dipak Sakhare is the original defendant whereas the Respondents herein are the original plaintiffs. Suit was filed for possession of area 17 R land, which is alleged to have been encroached upon by the defendant. Suit was registered as Regular Civil Suit No. 566 of 1988 and the learned trial court dismissed the suit on 15.10.2008.

4. Felt aggrieved by the said decree of dismissal, Regular Civil Appeal No. 143 of 2008 was filed by the plaintiffs before the first appellate court. During pendency of the appeal, appellants therein filed an application (Exhibit 10) for joint measurement of the disputed portion. The said application was opposed by the original defendant on the ground that during pendency of the suit, though measurement was directed by the learned trial court, said measurement could not be effected for non-payment of amount required for the said measurement, by

the original defendant.

5. Be that as it may, the learned Judge of the lower appellate court, in my view, rightly by keeping reliance on the reported decision of this court in *Kashinath Chindhuji Shastri, Appellant Vs. Jaronjai Matjiko Nawamtjade, Respondent*¹, which is repeatedly relied upon by various courts, allowed the application filed on behalf of the original plaintiffs (Exhibit 10). However, instead of remanding the matter for the limited purpose of joint measurement, the learned lower appellate court has set aside the entire judgment and decree without giving opportunity to the parties to address further on the issues involved in the appeal. In my view, this has resulted in miscarriage justice, which can be cured by giving following directions:

- (i) The impugned judgment and order dated 2nd February, 2015 passed in Regular Civil Appeal No. 143 of 2008 is set aside to the extent it set aside the judgment and decree passed by the trial court;

¹ 2004 (2) Mh. L. J., 722.

- (ii) Exhibit 10 application filed by the original plaintiff for joint measurement is hereby allowed;
- (iii) The lower appellate court shall pass appropriate order for appointment of competent surveyor as an expert to carry out joint measurement of land bearing Gat No. 55/1 situated at village Isabavi, taluka Pandharpur, at the cost of plaintiff and shall obtain the report alongwith the map of such measurement, and thereafter decide the appeal on its own merits and in accordance with law, by giving opportunity of hearing to both the parties.
- (iv) Appeal from order is allowed in the aforesaid terms with no orders as to costs. Needless to state that all pending civil applications filed in this appeal are disposed of.

Sd/-
[V. M. DESHPANDE, J.]

Vinayak Halemath